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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1995

CASSANDRA DIAZ, JUAN R. PEREZ AND ANTONIO DIAZ, BY THEIR MOTHER AND NATURAL GUARDIAN, ANGELINA PEREZ,

Petitioners,

- against -

THE CITY OF NEW YORK AND THE NEW YORK CITY HEALTH AND HOSPITALS CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION

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COUNTER-QUESTIONS PRESENTED

1. Should this Court deny the writ on jurisdictional or prudential grounds, or both, where the alleged Constitutional and section 1983 claims were never properly presented to, and hence not passed upon, by the state courts?

2. Even if petitioners' failure to raise their claims below does not provide a jurisdictional impediment to review, should the writ be denied for lack of a substantial federal question, (a) where this Court has consistently upheld the authority of state legislatures to limit the right to sue by imposition of conditions precedent and statutes of limitations similar to the notice-of-claim provisions contained in New York State's General Municipal Law sections 50-e and 50-i; (b) where petitioners' alleged federal claims reduce to the proposition that state decisional law applying the notice-of-claim provisions is not uniform, but this Court has equally consistently held that, in guaranteeing equal protection and due process, the Fourteenth Amendment does not assure uniformity of judicial decisions or immunity from judicial error; and (c) where, in any event, there was no error or lack of uniformity here because, having concededly failed to file a notice of claim within the required time period, petitioners' quarrel is with the lower court's discretionary determination, after considering the applicable statutory criteria, not to permit late filing, and such a determination will by definition depend on an assessment of circumstances which vary from case to case?

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REASONS FOR DENYING THE WRIT

POINT ONE

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BRIEF IN OPPOSITION

JURISDICTION

Petitioners erroneously rely on 28 U.S.C. § 1254 to invoke this Court's jurisdiction. That provision applies solely to review of cases decided by federal courts of appeal, whereas 28 U.S.C. § 1257 governs writs of certiorari in state court matters. However, as discussed more fully in Point One, *infra,* the requirements of section 1257, and of Rules 10 and 14(1)(g)(i) of the Rules of this Court, as interpreted and applied in this Court's decisional law, have clearly not been met, and the writ should be denied for lack of jurisdiction without reaching the merits of the petition.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

On page 2 of their application, petitioners allege that this case involves the Fifth and Fourteenth Amendments to the United States Constitution and 42 U.S.C. section 1983. Petitioners do not make reference to the state law provisions

whose application to the facts of this case allegedly violated their federal rights, to wit: New York General Municipal Law ("GML") section 50-e(1) which, in pertinent part, requires service of a notice of claim within 90 days after the claim arises in any tort case where a notice of claim is a condition precedent to suit; GML section 50-i(1), which makes a notice of claim a condition precedent in all personal injury actions prosecuted against a municipality, further providing that such actions must be commenced within one year and 90 days after the happening of the event on which the claim is based; and GML § 50-e(5), which provides that, in its discretion, the court may extend the original 90-day period for filing a notice of claim, as long as the extension does not exceed "the time limited for the commencement of an action" *(i.e.*, the one year and 90 days of GML § 50-i[1], unless subject to a statutory toll). GML § 50-e(5) also sets forth several factors to guide the

court in its discretionary determination of whether or not to grant such an extension. These state provisions are reproduced in full in the Appendix to this brief. Also reproduced are the 10-year tolling provisions of New York Civil Practice Law and Rules ("CPLR") section 208 relating to infancy and insanity, which, under New York law, extend the period during which a court is empowered to exercise its discretion to grant leave to file a late notice of claim, but which do not eliminate the threshold 90-day requirement.

STATEMENT OF THE CASE

A. Factual Background

On December 12, 1986, at approximately 2:00 a.m., a fire broke out at 106 Hull Street, Brooklyn, New York (65).[1] The fire then spread to 104 and 102 Hull Street,

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[1] Numbers in parentheses not preceded by a letter refer to pages in the Record on Appeal submitted to the New York Supreme Court, Appellate Division, Second Department. (continued...)

buildings that were adjoined to one another by a common wall (65). The infant petitioners and their mother, Angelina Perez, were residents of 102 Hull Street (20).

Because of the fire, the occupants of 102 Hull Street were assisted in exiting from the building by the New York City Fire Department (66). After removal from the building, the Fire Department contemporaneously prepared "structural report" records indicating, inter alia, that mouth-to-mouth resuscitation was performed on Cassandra Diaz by Fire Fighter Rotanz (66, 67). The occupants of 102 Hull Street who were injured as a result of the fire were then taken to the hospital to receive treatment for their injuries (68). Seventy-two hours after the incident everyone except petitioner Cassandra Diaz and her infant brother, petitioner

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[1] (...continued)
Parenthetical references preceded by the letters "PA" refer to pages in the appendix to the instant Petition for Certiorari; the letters "RA" indicate pages in the appendix to the respondents' Brief in Opposition.

Juan Perez, were listed in fair or satisfactory condition (68). Within three days after the incident, a third sibling, petitioner Antonio Diaz, was released from the hospital in satisfactory condition (68).

Although there is no mention in Fire Department records, or any other records, petitioners claim that, when being removed from the building, the infant Juan Perez "... was dropped at least once by a fireman, striking his head when he was dropped" (58). And even though, as noted above, documentation concerning resuscitation efforts appears in contemporary Fire Department records (67), petitioners also allege that at "no time did any member of the New York City Fire Department attempt to resuscitate ... Cassandra Diaz" (58).

B. Procedural History

In February of 1988, within the one year and 90-day period of GML § 50-e(5), petitioners brought on a motion

seeking permission to file a late notice of claim against the City of New York and the New York City Health and Hospitals Corporation (hereinafter "HHC")(7). In an order dated April 11, 1988, the Supreme Court, County of Kings, denied petitioners' motion, with leave to make another application on proper papers (PA 17a).

Inexplicably, that application was not made for another three and one-half years, when, on September 26, 1991, petitioners, having obtained new counsel, sought permission to file a late notice of claim (45). By order dated October 18, 1991, the Supreme Court denied petitioners' motion on the merits (PA 6a).

On June 1, 1993, almost two years after the second motion had been denied and six and one-half years after the incident, petitioners moved to renew and reargue the Supreme Court's denial of the motion. By order dated

September 2, 1993, the Supreme Court, County of Kings, denied the motion (PA 4a).

Petitioners sought review in the Appellate Division, Second Department, which, *inter alia,* affirmed the lower court's order denying leave to serve a late notice of claim on January 30, 1995 (PA 2a-3a). Petitioners thereupon sought reargument in the Appellate Division or, in the alternative, leave of the Appellate Division to appeal to New York State's highest court, the Court of Appeals. This motion was denied by order entered April 10, 1995 (PA 11a-12a).

As permitted by CPLR section 5602(a), petitioners then sought leave to appeal in the Court of Appeals itself. This motion was dismissed in part and denied in part by order dated September 7, 1995 (PA 13a-14a). Petitioners' subsequent motion to reargue was denied by order of the same Court dated December 28, 1995 (PA 16a).

OPINIONS BELOW

A. Opinions of the Lower Court

In considering petitioners' original 1988 motion, the Supreme Court, Kings County (Bernstein, J.), found it jurisdictionally defective, citing *Application of Crespo*, 123 Misc2d 862, 478 NYS2d 319 (Sup. Ct., N.Y.Co., 1984). In *Crespo*, the Court held, *inter alia,* that where, as here, a special proceeding is commenced to obtain permission to file a late notice of claim before a summons and complaint have been served, jurisdiction is not obtained merely by mail service of a "notice of motion." Accordingly, in the instant case, petitioners' motion was denied on that ground, but "without prejudice to another application brought on by proper service" (PA 18a).

Concerning the second application, made three and one-half years after issuance of the original order, the same Court ruled on the merits, finding that permission to file a

late notice of claim should be denied because (1) the delay in seeking leave had nothing to do with the injuries claimed by the petitioners; (2) there was no showing that the respondents had acquired knowledge of any of the facts underlying the claim; and (3) given that situation, "a delay of five years must, of necessity, result in prejudice" (PA 7a).[2]

Two years later, in denying petitioners' motion to renew or reargue, the Court found reargument inappropriate because "[t]here were no errors in considering the facts submitted in the prior motion" (PA 4a). As to renewal, the Court pointed out, *inter alia,* that petitioners had not

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[2] We draw the Court's attention to the fact that petitioners erroneously insist that the Supreme Court "retroactively rescinded its prior order granting leave to refile a late notice of claim application." Petition for Cert. at pp. ii and iii (emphasis added). The Record demonstrates no support for this proposition, which forms the linchpin for almost all of petitioners' claims. What the lower court did in its October 1991 order was to consider the application, i.e., accept the refiling, but then determine that it should be denied on the merits.

submitted, as normally required by New York practice, any explanation of why the "additional facts" contained in the renewal motion were not available when the original application had been made (PA 4a). On the merits, the Court stated that it was sympathetic to petitioners' plight, but that, given, inter alia, the passage of six and one-half years since the fire, it felt compelled to deny the motion (PA 5a).

B. Opinions of the Intermediate State Appellate Court

In its January 30, 1995 opinion, the Appellate Division dismissed petitioners' appeal from the Supreme Court's 1993 order denying renewal or reargument on the ground that, because petitioners' motion was "based upon facts that could have been raised at the time of the original motion, and the petitioners offered no excuse for their failure to present the evidence at that time," the motion was, in actuality, only one to reargue (PA 2a). Under New

York law, denial of a motion to reargue is not appealable (id.).

On the merits of the underlying appeal from the Supreme Court's 1991 order, the Appellate Division reviewed the notice-of-claim requirements, noting that, in considering whether to grant permission for late filing, a court is statutorily required to take into account all relevant factors -- including, specifically, whether the public corporation acquired actual knowledge of the essential facts constituting the claim within the statutory 90 days, or soon thereafter; whether the claimant was an infant, or mentally or physically incapacitated; and whether the delay would prejudice the public corporation in maintaining its defense on the merits (PA 2a-3a). Here, the Appellate Division found (1) that petitioners had not proffered a legally acceptable excuse for their delay, which was explained neither by the mother's alleged incompetency nor the

petitioners' infancy; and (2) that respondents did not have actual knowledge of the facts underlying the claim within the 90-day period of GML § 50-e(1)(a). Accordingly, the Appellate Division found that the lower court had not erred in denying petitioners' application to serve a late notice of claim (PA 3a).

The Appellate Division issued no opinion in connection with its subsequent April 10, 1995 order denying both reargument and leave to appeal.

C. Opinions of the New York State Court of Appeals in Denying Leave to Appeal

On the merits, the Court of Appeals denied leave to appeal from that part of the Appellate Division's order affirming the Supreme Court's October 18, 1991 order denying leave to file a late notice of claim, without elucidating its reasons for doing so. It dismissed that portion of the motion for leave which sought review of the Appellate Division's determination that the Supreme Court's

subsequent September 2, 1993 order was an unappealable denial of a motion to reargue, stating that the 1993 order did not "finally determine the proceeding within the meaning of the [state] Constitution" (PA 13a).[3]

REASONS FOR DENYING THE WRIT

POINT ONE

INASMUCH AS PETITIONERS' ALLEGED CONSTITUTIONAL AND SECTION 1983 CLAIMS WERE NEVER PROPERLY PRESENTED TO, AND HENCE NOT PASSED UPON, BY THE STATE COURTS, THE WRIT SHOULD BE DENIED ON JURISDICTIONAL OR PRUDENTIAL GROUNDS, OR BOTH.

It is black-letter law that this Court will not consider cases coming from the state courts unless the particular question for which review is sought was "either raised or

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[3] Under New York law, it is well-settled that "a determination made *subsequent* to a final determination is not itself a final determination for purposes of appeal to the Court of Appeals." Cohen and Karger, *Powers of the Court of Appeals*, § 10, p. 42 (Rev. Ed., 1992) (emphasis in original). Thus, the October 1991 order was final, but the September 1993 order patently was not.

squarely considered and resolved" in the state forum. *Illinois v. Gates*, 462 U.S. 213, 218, n.1 (1983). *Accord*, *Street v. New York*, 394 U.S. 576, 581-582 (1969); *Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940). This principle is embodied in Rule 14(1)(g)(i) of the Rules of this Court, which requires a petitioner seeking review by certiorari to specify, *inter alia*, "the stage in the proceedings ... when the federal questions sought to be reviewed were raised; ... [and] the way in which they were passed on [by the state courts]; ... so as to show that the federal question was *timely and properly raised* and that this Court has jurisdiction to review the judgment on a writ of certiorari" (emphasis added).

Whether the "not pressed or passed upon below" rule is considered jurisdictional or prudential, *see, Illinois v. Gates, supra,* 462 U.S. at 218-219, it clearly dictates

denial of the instant petition. As petitioners themselves describe the context in which they allegedly raised their federal claims (*see,* Pet. for Cert. at p. 4, note 1), the state courts could not, and hence did not, rule on them.

Petitioners concede that they never cast their claims in terms of denial of due process (including denial of access to the courts) and equal protection until submission of their October 24, 1994 reply brief to the Appellate Division. Pet. for Cert. at p. 4, note 1. This was patently untimely, because the Appellate Divisions of this State have uniformly announced that they will not consider new issues raised for the first time in a reply brief. *See, e.g., Crest Auto Leasing v. Green,* 211 AD2d 525, 622 NYS2d 441 (1st Dept., 1995); *State Farm Fire and Casualty Co. v. LiMauro*, 103 AD2d 514, 521-522, 481 NYS2d 90 (2nd Dept., 1984), *aff'd*, 65 NY2d 369, 492 NYS2d 534, 482 NE2d 13 (1985).

Nor is it of any moment that petitioners reiterated their alleged due process and equal protection claims in their initial motion in the Court of Appeals seeking review by that Court, as well as in their subsequent motion to reargue its denial. The New York State Court of Appeals has repeatedly stated that it will not consider constitutional issues raised for the first time in that court. *See, e.g., Matter of Barbara C.,* 64 NY2d 866, 487 NYS2d 549, 476 NE2d 994 (1985); *Melahn v. Hearn,* 60 NY2d 944, 471 NYS2d 47, 459 NE2d 156 (1983); *Eagle v. Paterson,* 57 NY2d 831, 455 NYS2d 759, 442 NE2d 56 (1982); *Barber v. Dembroski,* 54 NY2d 648, 442, NYS2d 768, 426 NE2d 175 (1981).

Furthermore, even if petitioners used the words "due process" and "equal protection" in their Appellate Division reply brief, and even if the Appellate Divisions of this State would consider it acceptable to raise new issues

for the first time in that context (which, as discussed above, they would not), respondents submit that passing references to these concepts, without developed analysis or argument, are insufficient to satisfy the "pressed or passed upon below" rule. In the context of the 28-page reply brief, for example, the "constitutional" claims reduce to one sentence on page 1 stating, in pertinent part, that "[t]he Petitioners in this action have been deprived of their day in court and have been denied their rights to due process and equal protection of the laws, as guaranteed by the federal and state constitutions, merely because their former counsel ... moved for leave to file a late notice of claim by way of notice motion [*sic*] instead of order to show cause." This statement is basically reiterated on page 6: "Cassandra and the other Petitioners are entitled to their day in Court. They should not be denied due process and equal protection of the law merely because their former counsel proceeded

by notice of motion instead of order to show cause and then failed to correct their nonprejudicial, procedural error." Not a case is cited in support of the proposition that proper application of validly imposed jurisdictional requirements, or conditions precedent to suit, or statutes of limitations, offends due process or must be subjected to an equal protection analysis. Under such circumstances, we submit that these issues were not just raised in an untimely manner, but not even properly raised at all. *Cf. Beck v. Washington,* 369 U.S. 541, 553 (1962).[4]

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[4] The "separation of powers" claim does not appear until even later, when petitioners moved to reargue in the Appellate Division (motion at ¶ 87), where it is simply asserted in passing in an equally conclusory manner – *i.e.*, without analysis. In addition, respondents have been unable to locate anywhere in the pleadings and briefs below a reference to a section 1983 claim.

POINT TWO

BECAUSE PETITIONERS' VAGUE ALLEGATIONS OF DUE PROCESS AND EQUAL PROTECTION VIOLATIONS ARE BASED ON THE PREMISE THAT A VALID STATE LAW HAS BEEN MISAPPLIED, THIS CASE DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION MERITING REVIEW BY THIS COURT.

In setting forth certain of the "Considerations Governing Review on Certiorari" in Rule 10 of its Rules, this Court has cautioned that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of ... the misapplication of a properly stated rule of law," The decisional law is even more explicit:

> We have said time and again that the Fourteenth Amendment does not "assure uniformity of judicial decisions ... [or] immunity from judicial error ...." Milwaukee Electric Ry. & Light Co. v. Wisconsin ex rel. Milwaukee, 252 U.S. 100, 106 (1920).

Beck v. Washington, 369 U.S. 541, 554-555 (1962). "Were it otherwise," the Beck Court then observes, "every alleged misapplication of state law would constitute a federal constitutional question." Id. at 555. Misapplication of state law is precisely the premise upon which the instant petitioners are proceeding, and, in addition to the jurisdictional deficiencies, precisely the reason why the writ should be denied.

We note, first, that petitioners do not claim that the provisions of New York's General Municipal Law establishing a notice of claim requirement are themselves unconstitutional, as indeed they could not. This Court has observed that "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary and irrational." Martinez v. California, 444 U.S. 277, 282

(1980). Cf. Sun Oil Co. v. Wartman, 486 U.S. 717, 730 (1988) (state's interest in determining when a claim is too stale to be adjudicated suffices to give it legislative jurisdiction to control available judicial remedies by imposing statutes of limitations); Chase Securities Corp. v. Donaldson, 325 U.S. 304, 314 (1945) (statutes of limitation "go to matters of remedy, not to destruction of fundamental rights").[5]

More specifically, New York's own appellate courts have upheld the validity of the notice of claim provisions in the face of due process and equal protection challenges under both the state and federal constitutions. See, e.g.,

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[5] As interpreted by the New York courts, the requirement that a notice of claim be filed within 90 days is a condition precedent to suit. Davidson v. Bronx Municipal Hospital, 64 NY2d 59, 61, 484 NYS2d 533, 473 NE2d 761 (1984). The provisions permitting a court, at its discretion, to grant leave to file a late notice of claim, as long as the extension does not exceed one year and 90 days (subject to any applicable statutory tolls), act as a statute of limitations. Cohen v. Pearl River Union Free School District, 51 NY2d 256, 434 NYS2d 138, 414 NE2d 639 (1980).

Matter of Brown v. Board of Trustees, 303 NY 484, 104 NE2d 866 (1952); MacMullen v. City of Middletown, 187 NY 37, 79 NE 863 (1907). Accord, Umansky v. N.Y. Met. Transit Authority, 111 AD2d 918, 491 NYS2d 33 (2nd Dept., 1985); Pausley v. Chalmoner, 54 AD2d 131, 388 NYS2d 35 (3rd Dept., 1976), app. dism'd, 41 NY2d 900, 388 NYS2d 35, 362 NE2d 641 (1975), app. denied, 41 NY2d 805, 395 NYS2d 1025, 363 NE2d 718 (1977); Guarrera v. A.L. Memorial Hosp., 51 AD2d 867, 380 NYS2d 161 (4th Dept., 1976), app. dism'd, 39 NY2d 942, 386 NYS2d 1029, 352 NE2d 897 (1976).

The lower federal courts which have considered the constitutionality of similar statutory requirements are in accord. See, e.g., Ornstein v. Regan, 604 F2d 212, 214 (2nd Cir., 1979) (noting, inter alia, that a statute of limitations is not unconstitutional even if it terminates an infant's right to make a claim before he reaches majority

and can exercise that right); Dinh v. Rust International Corp., 974 F2d 500, 502 (4th Cir., 1992) (no federal constitutional right to continued existence of common-law causes of action); Montegino v. Canale, 792 F2d 554, 558 (5th Cir., 1986) (in terms of procedural due process rights, access to the courts may be restricted with regard to a right which is not fundamental); Douglas v. Stallings, 870 F2d 1242 (7th Cir., 1989) (statute of limitations does not violate equal protection or, by restricting access to the courts, deny due process).

The existence of this unanimous body of case law simply emphasizes that petitioners' alleged federal claims reduce to the claim that the New York courts, under the individual circumstances of this case, misapplied an otherwise constitutionally valid state law. This fact is reinforced by the complete absence in the petition of any citation to federal cases supporting petitioners' position,

much less any attempt to show conflict between the decisions of the New York courts and those of this Court or other state courts of last resort. See, subsections (b) and (c) of this Court's Rule 10.[6]

Finally, respondents submit that the following elements of petitioners' argument lead irresistibly to the conclusion, if it has not been reached already, that their

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[6] Indeed, that this case involves only state law questions is further underscored by the fact that the only so-called "conflict" to which petitioners point allegedly emerges when the determination here is compared with other decisions of the Appellate Division, Second Department, or with decisions of the other Appellate Divisions and of New York State's highest court. If it exists, that is an issue for this state's court of last resort to resolve.

Furthermore, we note in passing that the lack of any genuine federal question can also be inferred from the fact that petitioners themselves did not attempt to take an appeal to the New York State Court of Appeals as of right, on the ground that a substantial constitutional question was directly involved, as permitted by CPLR § 5601(b)(1). Instead, they chose the alternate route of seeking discretionary review pursuant to CPLR § 5602(a) and (b), which is only appropriate when an appeal as of right on constitutional grounds is not available.

attempt to obtain a writ of certiorari from this Court borders on the frivolous:

(1) A "separation of powers" argument (Pet. for Cert. at, e.g., p. 13) based on the federal rather than the New York State Constitution is obviously untenable: Article I, section 8 of the former relates solely to allocation of powers among the branches of the federal government.

(2) Petitioners are attempting to obtain "federal question" review of a determination of the Appellate Division, Second Department, yet they devote an entire point in their brief to the proposition that the Court of Appeals erred in dismissing, as non-final under the New York State rather than the federal constitution, that portion of their motion seeking leave to appeal from the order upholding denial of the request for reargument or renewal (Pet. for Cert. at pp. 23-24) (see footnote 3, supra).

(3) Petitioners' assertion of lack of uniformity in state decisional law, while it emphasizes the non-federal nature of their claim, is premised on the assumption that absolute uniformity is possible in situations where courts are instructed, and given the discretion, to consider "all relevant circumstances," in addition to the statutorily-enumerated criteria (GML § 50-e[5]). Uniformity of this sort cannot, by definition, be achieved, since those circumstances vary from case to case; accordingly, the state appellate courts review such decisions for abuse of discretion. That no such abuse was found here does not create a question of federal law reviewable by this Court.

(4) Under New York law, while the one-year and 90-day period of GML § 50-e(5) in which a potential plaintiff may seek leave to file a late notice of claim is tolled by infancy or disability, this does not, as petitioners believe, compel the granting of the extension. See Cohen

v. Pearl River School District, supra, 51 NY2d at 265. If it did, the state court's legislatively-conferred ability to exercise its discretion would be eliminated. Here, the lower state court recognized the applicability of the toll by not simply dismissing petitioners' motion as untimely. See, Pierson v. City of New York, 56 NY2d 950, 453 NYS2d 615, 439 NE2d 331 (1982) (court is without authority to provide relief from failure to file a notice of claim once the applicable one-year and 90-day period has expired).[7]

(5) As affirmed by the Appellate Division, the trial court appropriately found that the infancy of certain of the petitioners did not cause the delay; that the mother's asserted psychological infirmity between 1986 and 1988 could not explain why no action was taken between 1988 and 1991, when petitioner's second motion was made; and that, while respondents clearly had knowledge from

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[7] This fact disposes of petitioners' contention that the state courts ignored the toll. Pet. for Cert. at p. ii.

contemporary records that the December 12, 1986 fire had occurred, those same records not only did not provide notice that the claims asserted by petitioners might exist, but flatly contradicted the validity of those very claims.

(6) The assertion that, because the City at one point sought, unsuccessfully, to obtain custody of the infants, the failure of the City itself to file a notice of claim created a conflict of interest and a constitutional violation is untenable. First, in seeking to protect the children, the City cannot be held responsible for not pressing a tort claim of which it had no independent knowledge. Secondly, the statute itself provides that where an infant is an adjudicated "ward" of the City, no notice of claim is required. GML § 50-e(8). Indeed, in their final state court papers seeking reargument of the Court of Appeals' denial of their motion for leave, petitioners argued that section 50-e(8) dispensed with the necessity of filing a notice of claim. Only in this

Court has the "conflict of interest" argument emerged as support for an alleged due-process violation.

In sum, where, as here, no substantial federal question is presented and the core issue involves the application of local law by the state courts, this Court should decline to undertake further review. Black v. Cutter Laboratories, 351 U.S. 292, 299-300 (1956).

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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APPENDIX:

APPLICABLE STATE STATUTES

General Municipal Law § 50-e. Notice of Claim.

1. When service required; time for service; upon whom service required.

(a) In any case founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation, as defined in the general construction law, or any officer, appointee or employee thereof, the notice of claim shall comply with and be served in accordance with the provisions of this section within ninety days after the claim arises; except that in wrongful death actions, the ninety days shall run from the appointment of a representative of the decedent's estate.

* * *

5. Application for leave to serve a late notice.

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The extension shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its

attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including: whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

An application for leave to serve a late notice shall not be denied on the ground that it was made after commencement of an action against the public corporation.

General Municipal Law § 50-i. Presentation of Tort Claims; Commencement of Actions.

> No action or special proceeding shall be prosecuted or maintained against a city, county, town, village, fire district or school district for personal injury, wrongful death or damage to real or personal property alleged to have been sustained by reason of the negligence or wrongful act of such city, county, town, village, fire district or school district or of any officer, agent or employee thereof, including volunteer firemen of any such city, county, town, village, fire district or school district or any volunteer fireman whose services have been accepted pursuant to the provisions of section two hundred nine-i of this chapter, unless, (a) a notice of claim shall have been made and served upon the city, county, town, village, fire district or school district in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers, that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused, and (c) the action or special proceeding shall be commenced within one year and ninety days after the happening of the event upon which the claim is based; except that wrongful death actions shall be commenced within two years after the happening of the event upon which the claim is based; except that wrongful death

actions shall be commenced within two years after the happening of the death.

2. This section shall be applicable notwithstanding any inconsistent provisions of law, general, special or local, or any limitation contained in the provisions of any city charter.

Nothing contained herein or in section fifty-h of this chapter shall operate to extend the period limited by subdivision one of this section for the commencement of an action or special proceeding.

Civil Practice Law and Rules § 208. Infancy, Insanity.

If a person entitled to commence an action is under a disability because of infancy or insanity at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years after the disability ceases, or the person under the disability dies, the time within which the action must be commenced shall be extended to three years after the disability ceases or the person under the disability dies, whichever event first occurs; if the time otherwise limited is less than three years, the time shall be extended by the period of disability. The time within which the action must be commenced shall not be extended by this provision beyond the years after the cause of action accrues, except, in any action

other than for medical, dental or podiatric malpractice, where the person was under a disability due to infancy. This section shall not apply to an action to recover a penalty or forfeiture, or against a sheriff or other officer for an escape.